Supreme Court, U.S.
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NO. _____

IN THE
Supreme Court of the United States
October Term, 1993

JIM VANOVER and KEITH SHOTWELL,
Petitioners,

v.

MONIQUE LAMPKIN and CHARLES R. DANIELS, JR.,
Respondents,

Petition For Writ Of Certiorari
To The United States Court
Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

1. Whether the interlocutory appeal by Petitioners, Jim Vanover and Keith Shotwell, of the denial of their motion for summary judgment based upon qualified immunity, was properly dismissed by the Court of Appeals for the reason it lacked jurisdiction to review such appeal.

2. Whether the interlocutory appeal by Petitioners, Jim Vanover and Keith Shotwell, was properly dismissed by the Fifth Circuit Court of Appeals, in light of the direct conflict of authority by a majority of courts of appeal which would have reviewed the merits of such appeal.

3. Whether the Court of Appeals dismissal of Petitioners interlocutory appeal was contrary to this Court's jurisprudence on the issue as well as the underlying purpose of the doctrine of qualified immunity.

4. Whether a fact issue, bearing directly upon the qualified immunity determination, existed to preclude the Fifth Circuit Court of Appeals from deciding whether Petitioners' conduct in stopping and detaining Respondents was reasonable in light of clearly established law so as to be entitled to entitled to qualified immunity from suit.

5. Whether the Petitioners' conduct in determining that a stop and search of the Respondents' vehicle was appropriate, was reasonable in light of clearly established law entitling Petitioners to qualified immunity from suit.

6. Whether the Court of Appeals, in deciding a fact issue existed bearing directly upon the qualified immunity determination, thereby precluding jurisdiction to determine the issue of Petitioners' qualified immunity, departed from accepted course of proceedings to merit review by this tribunal.

7. Whether the Court of Appeals, in dismissing Petitioners' interlocutory appeal based upon the denial of summary judgment based upon qualified immunity has decided an important question of federal law contrary to federal principles or this Court's jurisprudence.

8. Whether the Court of Appeals, in dismissing Petitioners' interlocutory appeal based upon qualified immunity, has effectively precluded Petitioners' ability to bring a second appeal due to the burden of shouldering additional costs and expenses associated with another appeal and the pre-trial "one bite at the apple" rule frequently employed by the discretion of the courts of appeals.

PARTIES

PETITIONERS:

Jim Vanover
Keith Shotwell

RESPONDENTS:

Monique Lampkin
Charles Rayford Daniels, Jr.

Pursuant to Rule 29.1, there are no parent companies or subsidiaries.

Party to judgement in the District Court who has no interest in the outcome of this case;

City of Nacogdoches

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, the judgment herein sought to be reviewed, is reported at 7 F.3d 430 and reprinted in Appendix "A" to this Petition. The opinion of the United States District Court for the Eastern District of Texas entered on the docket July 18, 1991 is reprinted in Appendix "B."

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered November 18, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 1291 which provides:

> The Court of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States ... except where a direct review may be had in the Supreme Court ...

As interpreted by this Court, this provision of the United States Code vests Courts of Appeals with jurisdiction to review final decisions from district courts, including interlocutory appeals from the denial of summary judgment on the issue of qualified immunity.

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Texas had jurisdiction over this case under 28 U.S.C. § 1331. Petitioner, Jim Vanover, will be referred to herein as "Vanover." Petitioner, Keith Shotwell, will be referred to herein as "Shotwell." Respondent, Monique Lampkin, will be referred to herein at times as "Lampkin." Respondent, Charles Rayford Daniels, Jr., will be referred to herein at times as "Daniels."

On July 1, 1990, an individual named Scott Hamilton was shot in a drive-by shooting within the City limits of the City of Lufkin, Texas, approximately thirty miles from the City of Nacogdoches. The Lufkin Police Department investigated the shooting, but, by the time of Scott Hamilton's death on July 3, 1990, they had not identified his attackers.

On the same day Hamilton died, July 3, 1990, the Lufkin Police Department, including Lieutenant Alton Lenderman, Jr., received information that Brian Hamilton, the decedent's brother, had announced his plan to drive to Nacogdoches on July 4, 1990 or "early" July 5, 1990 to commit a drive-by shooting in revenge for his brother's murder. They were also advised that Brian Hamilton as also suspected of possessing at least one handgun and a shotgun and that he drove a blue and white Chevy Nova, believed to be a 1978 model. The Lufkin Police Department put credence on this report and, believing Brian Hamilton would make good his threat to vindicate his brother's death, referred this information to Sergeant Langham of the Nacogdoches Police Department.

Upon receiving this information, the Nacogdoches Police Department disseminated it to all officers and commissioned staff. All officers were requested to look for two black suspects and the Chevy Nova and warned the situation was potentially dangerous.

The next day, on July 4, 1990, while on routine patrol, Nacogdoches Police Officer Jim Vanover observed a two-toned, dark over white older model Chevrolet Nova heading eastbound on Orton Street. He saw two passengers who were black, but, because of the dark window tint on the car windows, he could not determine whether anyone was seated in the back seat. In light of the information dispatched the day before, Vanover thought the vehicle was unusual, because of its age and two-toned color, and suspected it might be the vehicle identified by the Lufkin Police Department. Therefore, he began to follow the car and called in his sighting to the dispatcher. Officer Lamonte heard the dispatch and joined Vanover in the surveillance. During this time, the officers attempted to locate a safe place

to make a felony-type traffic stop to investigate the vehicle and its occupants.

As they followed the vehicle, they noticed it turn into a driveway in the 1700 block of Railroad Street. Vanover drove past that driveway and turned his car around to face the rear of suspect vehicle, while Officer Lamonte stopped just short of the driveway, where the two police vehicles faced one another on opposite sides of the vehicle. This was done to increase the officers' safety and to prevent the possible flight of the suspects.

Because the officers heard there might be firearms in the vehicle, they performed a "felony stop" procedure in which they drew their service revolvers and pointed them at the vehicle while maintaining cover behind their police cars. They ordered the occupants of the vehicle to step out with their hands up and in response, Respondents, Lampkin and Daniels complied. When Respondents reached the back of their vehicle, Vanover approached them while Officer Lamonte provided cover. While this occurred, Officer Keith Shotwell and other arrived at the scene. Vanover conducted a weapons patdown on Daniels and used the back of his hand to make a similar patdown on Lampkin. While the patdown was conducted, Shotwell approached the driver's side of the Chevrolet Nova and shined his flashlight inside to determine whether there were any visible weapons. When he looked inside the driver's side window he observed what appeared to be a rock of crack cocaine lying on driver's seat. Although he could not see specifically what the substance was, he recognized it as resembling crack cocaine, and found it appeared in a location consistent with other illegal substances he had previously retrieved.

Before entering the vehicle, Shotwell approached the rear of the vehicle and observed Vanover handcuffing

Daniels and placing him in his patrol unit. Shotwell assisted in handcuffing Lampkin and placed her in the back of his patrol unit. Then, he and Vanover explained to Respondents the necessity of handcuffing them and placing them in a secure area until they could determine whether the vehicle contained weapons or an illegal substance.

After placing Respondents in the police cars, Shotwell entered the vehicle to search the interior. Upon entering the vehicle, he found a brown paper sack located under the driver's seat. The brown sack was discovered to contain hard mint candies which resembled the broken substance seen by Shotwell and believed to have been crack cocaine. Once the candy was identified, and no weapons were found, Respondents were removed and unhandcuffed and the officers explained the reasons for their stop and detention. The Nacogdoches Police Department dispatcher's log and the officers' records indicate the stop of Respondents' car was made at 11:08 p.m. and that all officers cleared the scene within twelve minutes, at 11:20 p.m. on July 4, 1990.

Respondents sued the City of Nacogdoches, Vanover and Shotwell under, among other things, 42 U.S.C. § 1983, alleging the deprivation of the constitutional right to be free an unreasonable search and seizure and from excessive force. On January 18, 1991, Vanover and Shotwell moved the court for a summary judgment, requesting qualified immunity. On July 17, 1991, the District Court entered a Memorandum Order denying the motion for summary judgment. Petitioners Vanover and Shotwell appealed only the district court's denial of qualified immunity on the issue of Respondents' search and seizure claims to the United States Court of Appeals for the Fifth Circuit. However, in a decision dated November 18, 1993, that court dismissed the interlocutory appeal on the ground the court lacked jurisdiction to determine the issue of qualified immunity, due

to an historical factual dispute. Petitioners Vanover and Shotwell now petition for a writ of certiorari to challenge the Court of Appeals' decision.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRONEOUSLY DISMISSED PETITIONERS' INTERLOCUTORY APPEAL ON THE ISSUE OF QUALIFIED IMMUNITY FOR THE REASON IT LACKED JURISDICTION DUE TO A PERCEIVED BUT UNIDENTIFIED FACTUAL DISPUTE.

Jurisdiction over appeals from final decisions of the district courts is vested in the courts of appeals under 28 U.S.C. § 1291. It is well-established by the jurisprudence of this Court that an interlocutory appeal based upon the narrow issue of qualified immunity, although not a "final" decision, falls within such jurisdiction. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Before this occasion, the Fifth Circuit recognized this rule. *Salas v. Carpenter*, 980 F.2d 299, 303-304 (5th Cir. 1992) ("Denial of dismissal or summary judgment for want of qualified immunity fits within the small class of interlocutory decisions qualifying for appellate review"). In addition to this Court's holding in *Mitchell,* an additional basis for the appellate jurisdiction over a district court's denial of official immunity exists under the "collateral order" doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *Cohen* provides for an immediate appeal when an order "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from a final judgment." *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982). It is clear the denial of qualified

immunity is generally reviewable *de novo* through an interlocutory appeal. But Petitioners submit there is no statute nor precedent which allows the Fifth Circuit to arbitrarily limit its jurisdiction by the dismissing Petitioner's interlocutory appeal merely because the court "feels" the issue is blurred by an unidentified "historical" factual dispute. Schwarzer, *Summary Judgment Under Federal Rules*, 99 F.R.D. 465, 472-73 (1984) (discussing disputed, historical and ultimate facts and the consequences of same on summary judgment). The Fifth Circuit's decision overrules *sub silentio* the decisions of this Court and strays from the majority of circuits considering the issue. The Fifth Circuit's refusal to address the issue, due to an alleged "historical" factual dispute between the parties, and to follow precedent, denies Petitioners their right to this interlocutory appeal and to constitutional repose.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION DENIES PETITIONERS' RIGHT TO AN IMMEDIATE APPEAL ON THE ISSUE OF QUALIFIED IMMUNITY AND CONFLICTS WITH THE MAJORITY OF CIRCUITS ADDRESSING THE ISSUE.

The majority of the courts of appeals have uniformly recognized, pursuant to *Mitchell v. Forsyth*, the unequivocal right of immediate appeal of the denial of qualified immunity. However, a minority of the circuits have decided to the contrary, holding no jurisdiction exists to review the issue when immunity is denied because of disputed factual issues. Illustrative of the split between the circuits is *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992). *Kulwicki* stands for the premise that "a narrow reading of *Mitchell* is not the law of this circuit." *Id.* at 1460.

According to the Third Circuit *Kulwicki* court, "Our jurisdiction to hear immunity appeals is limited only where the district court does not address the immunity question below, or where the court does not base its decision on immunity per se." *Id.* According to that court:

> We recognize that the courts of appeals do not take a uniform view of appellate jurisdiction over denials of immunity ... Our holding in *Schrob* is consistent with the decisions in the First and District of Columbia Circuits, that do not make factual resolution a prerequisite of appellate jurisdiction. By contrast, the Second, Fifth, and Eleventh Circuits decline appellate jurisdiction where factual issues regarding an official's immunity claim remain. (citations omitted).

Id. at 1461.

The Third Circuit's decision is also followed by the Tenth Circuit, which holds there is interlocutory appellate jurisdiction under *Mitchell,* "even though the district court based its denial of the motion on a finding that disputed material facts exist in the case." *Cole v. Ruidoso Mun. Schools*, 947 F.2d 903, 905 (10th Cir. 1991) (*Citing Austin v. Hamilton*, 945 F.2d 1155, 1157 (10th Cir. 1991)). In addressing this specific narrow issue, the Eighth Circuit has also found that, even where the issue of qualified immunity was not entirely separable from the merits, "taking jurisdiction of the appeal was fully consistent with the spirit and purpose of the Supreme Court in *Mitchell.*" *Craft v. Wipf*, 810 F.2d 170, 172 (8th Cir. 1987). In *Craft,* the Eighth Circuit stated:

> *Mitchell* should be interpreted liberally in terms of finding in favor of appealability ...

> Once an appellate court has accepted jurisdiction and begins trying to decide the merits of the qualified immunity question, the problem of which facts or alleged facts to use as the basis of decision may become troubling ... we believe it best to avoid hinging appealability itself on the degree of "factualness" of the issues. The Supreme Court "has expressly rejected efforts to reduce the finality requirement of Section 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal."

Craft, at 172-173 (citations omitted).

The Fifth Circuit Court of Appeals, in holding that it lacked jurisdiction over the appeal, due to the existence of factual disputes underlying the qualified immunity defense, impermissibly restricted its own jurisdiction and concomitantly denied Petitioners the right to have the issue of such immunity adjudicated at the earliest possible stage in the litigation proceedings. Here, there is no evidence Petitioners ever violated a clearly established right or were prohibited from conducting the stop and detention under clearly established legal norms. Under the eleventh circuit's jurisprudence, it is only when "the legal norms allegedly violated were as a matter of law clearly established at the appropriate time, a genuine fact issue as to what conduct the defendant engaged in would preclude a grant of summary judgment based upon qualified immunity."[1] *Swint v. City of*

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[1] The jurisdictional question is distinct from whether summary judgment would be proper when a factual dispute underlies the qualified immunity determination. The Eleventh Circuit has clarified that "factual disputes do not preclude summary judgment on qualified immunity "if the legal norms allegedly

Wadley, 5 F.3d 1435, 1442 (11th Cir. 1993). Thus, the exception for factual disputes arises only when the law prohibiting the conduct taken by a defendant officer is, in fact, clearly established. It should also be noted, at this juncture, that even those minority circuits which impermissibly limit the scope of their jurisdiction recognize "the mere existence of a factual quarrel does not effect the appealability of a denial of qualified immunity." *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 788 (11th Cir. 1992), *cert. denied*, ___U.S.___, 113 S.Ct. 1814 (1993). This Honorable Court should grant certiorari because the Court of Appeals has taken an improper view of its jurisdiction, contrary to the jurisprudence of a majority of the circuits, and has dismissed Petitioner's appeal because of mere factual disputes which could always defeat a legal determination of qualified immunity.[2]

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violated were not clearly established at the time of the challenged actions." *Swint v. City of Wadley*, 5 F.3d 1435, 1442 (11th Cir. 1993).

[2] Assuming the law to be clearly established, relevant facts would be those specifically establishing the alleged conduct, so that a determination could be made of its reasonableness in light of such clearly established law. Of course, nothing would prevent the court from taking any disputed matters in a light most favorable to the plaintiff.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS, BY DENYING PETITIONERS' INTERLOCUTORY APPEAL, MISAPPLIED PRECEDENT AND DEFEATED THE UNDERLYING PURPOSE FOR QUALIFIED IMMUNITY.

By dismissing the Petitioners' appeal for lack of jurisdiction, the Court of Appeals effectively precluded an early resolution of their qualified immunity. More significantly, the Court of Appeals has stripped Petitioners from the right to be free from the burdens of litigation, through an early determination of their immunity, and has undermined the writings of this Court in *Mitchell v. Forsyth*, and *Hunter v. Bryant*, ___ U.S. ___, 112 S.Ct. 534 (1991).[3] Recall, that under *Mitchell*, the entitlement to qualified immunity "is an immunity from suit rather than a mere defense to liability [which] is effectively lost if a case is erroneously permitted to go to trial ... Immunity ordinarily should be decided by the court long before trial." *Mitchell*, 105 S.Ct. at 2808, 2815. Last year, the Fifth Circuit recognized the purpose behind collateral order appeals from denials of immunity "is to effectuate the guarantee that immune parties will not become embroiled in litigation."

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[3] Recent case law indicates that individuals asserting the defense of qualified immunity may be entitled to only one interlocutory appeal of the denial of summary judgment. *Nelson v. Silverman*, 999 F.2d 417 (9th Cir. 1993). Thus, while an early resolution of the qualified immunity issue is necessary to achieve the goals under the doctrine, appellants face a risk of losing the pre-trial resolution, through appeal, of a denial of qualified immunity where some disputed fact issue may defeat appellate jurisdiction. Hence, appellants will become embroiled in the discovery process and litigation, which qualified immunity from suit is designed to prevent.

United States v. Moats, 961 F.2d 1198, 1201 (5th Cir. 1992). However, this year, it shirks its own precedent.

The aims and goals of qualified immunity are not served by the Court of Appeals requiring, as a condition to invoking appellate jurisdiction, that Petitioners show no disputed fact issue underlies their entitlement to qualified immunity. As the Eighth Circuit has stated, it is "best to avoid hinging appealability itself on the degree of 'factualness' of the issues." *Craft*, 810 F.2d at 172-73I.[4] If, in fact, the evidence indicates only that the individuals' conduct was unreasonable, in light of clearly established law, then, of course, summary judgment may be denied. But the Court of Appeals in this instance failed to resolve the qualified immunity issue early in the proceedings and, instead, held that it lacked jurisdiction, thereby denying the Petitioners' right to know whether they did, in fact, violate a clearly established norm so as to be denied the right to qualified immunity.

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[4] The eleventh circuit states the problem more succinctly. In *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983), the court held the objective reasonable test was a two-step analysis:

> [T]he defendant government official must prove 'he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred,' and then the burden shifts to the plaintiff to demonstrate that the defendant 'violated clearly established constitutional law.'

IV.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS DEPARTED FROM ACCEPTED COURSE OF PROCEEDINGS BY IMPROPERLY CONCLUDING QUALIFIED IMMUNITY COULD BE DEFEATED BY FACT ISSUES WHICH DO NOT RELATE TO QUALIFIED IMMUNITY.

Aside from the jurisdictional issue addressed herein, the Fifth Circuit Court of Appeals, in the instant case, failed to focus upon whether factual issues *underlying the qualified immunity determination* existed, as opposed to mere factual inconsistencies or credibility issues which have no bearing upon such determination. Here, upon Lampkin's and Daniel's mere allegations of the right to be free from an unreasonable search and seizure, the Court of Appeals invoked the stock phrase "the evidence is examined in the light most favorable to the non-movant," refusing to consider whether Petitioners were entitled to qualified immunity.

The Court of Appeals perfunctory dismissal ignored the very reason Petitioners sought an appeal on qualified immunity. Stated more succinctly, "the general rule, such as the right to be free from unreasonable seizures, is well-established; the crucial question is whether the law was clear in relation to the specific facts confronting the police officer." *Scott v. Glumac*, 3 F.3d 163, 164 (7th Cir. 1993). In other words, it was not enough to merely review the facts in the light most favorable to Respondents, the nonmovants, to prevent the summary judgment; the record had to show a material fact issue existed whether a reasonable officer in Petitioners' positions could not have believed reasonable

grounds existed before a stop, search or seizure was made.[5] *See e.g., Hutton v. Strickland*, 919 F.2d 1531 (11th Cir. 1990) (To avoid summary judgment on a claim of qualified immunity, plaintiff must show either the defendant not entitled to lead to qualified immunity or that a genuine issue of material fact that impinges upon the decisive question of law").

In this case, without considering evidence bearing upon Petitioners' reasonableness regarding their actions, the Court of Appeals improperly determined a disputed fact issue existed which impacted the qualified immunity determination, thereby precluding a review of the summary judgment. *But see and compare, Hunter v. Bryant*, 112 S.Ct. at 536 ("Even law enforcement officials who 'reasonably and mistakenly conclude probable cause is present' are entitled to immunity"). The relevant facts which bear on qualified immunity in the instant case are those which would establish that a reasonable officer could have believed the stop and detention of Respondents was legally justified, even if such officer was mistaken as to the existence of such justification.[6] Here, the Fifth Circuit failed to identify the

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[5] As noted by the Court of Appeals, Petitioners' appeal was based upon the claims by the Respondent of illegal search and seizure, as opposed to claims involving the use of excessive force. Petitioners appealed the denial of summary judgment, on the grounds of qualified immunity, with respect to the search and seizure claims only, since a partial affirmance of such issue would have disposed of the claims against one of the individual defendants and significantly narrow those against another.

[6] The issue whether legal justification existed is separate and distinct from the issue whether the responding officers were reasonable in stopping and detaining Respondents in light of the information they possessed. And whether excessive force was exercised during the stop is another independent issue on which Petitioners did not seek qualified immunity in their motion for summary judgment.

factual dispute which bears upon the qualified immunity determination. Hence, by judicial default, it is now unclear whether governmental defendants would ever obtain the an expeditious resolution of qualified immunity.

The material facts established by both the Petitioners and the Respondents were consistent with a reasonable stop and detention. Any factual disputes mentioned by the Court of Appeals related solely to immaterial issues and hindsight arguments, which were not germane to the reasonableness of the stop and detention. First of all, the court indicated that certain of the officers testified to matters which the others did not, such as that an individual named Brian Hamilton was coming to Nacogdoches during the afternoon of July 3, 1990. There was no dispute or inconsistency here, but merely a differing degree of factual specificity among the witnesses.

In fact, more than anything, the Court appeared to seize upon mere isolated discrepancies between the Petitioners' exact recollections, as opposed the facts preceding the stop, which were recounted between Petitioners and Respondents. Moreover, no officer denied the Chevrolet Nova, which was stopped, was not the precise color of the vehicle reported, or that the crushed mint, which, at first view, appeared to be crack cocaine, was not, in fact, candy. In fact, after the events were resolved, Petitioners acknowledged that Respondents were not the subjects being sought. The issue bearing upon the existence of qualified immunity is whether Petitioners were reasonable in stopping Respondents' vehicle, based upon the information before them. But, as mentioned before, the Court of Appeals failed to illuminate what material facts precluded resolution of the qualified immunity issue. Instead, the Court of Appeals merely stated:

> The record reflects that Lampkin and Daniels are a black man and woman, resident in Nacogdoches, who drove a black and white older model Chevy Nova into the driveway of their home from Lampkin's mother's home on the night of July 4, 1990. They were detained by 'felony stop' procedure, frisked, possibly roughed up, handcuffed and placed in separate cars for up to thirty minutes before being released. Although no weapons were found or even thoroughly searched for in their car, they were accused of harboring crack cocaine, which turned out to be candy mints.

Clearly, the Court of Appeals focused only on an "unclear" fact or norm, which it deemed "historical," or otherwise rubber-stamped Respondents interpretations on how the facts should be construed, under the usual summary judgment standard of believing only the nonmovants. To do this, the Court glossed over the uncontroverted fact that the windows of Respondents' Chevy Nova were tinted, and that, upon realizing the candy mints were not crack cocaine, the individuals were immediately released. The Fifth Circuit further ignored that two independent grounds existed during the encounter with Respondents: the closely matching vehicle and period of time in which it was observed, in light of the report about Brian Hamilton, and the discovery of what appeared to be an illegal substance after Respondents were stopped to confirm whether they were the Hamilton suspects.

V.

CERTIORARI IS WARRANTED BECAUSE THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION WRONGLY BY CONCLUDING PETITIONERS WERE NOT ENTITLED TO QUALIFIED IMMUNITY.

It is black-letter federal law, since the Supreme Court's Opinion in *Terry v. Ohio*, 392 U.S. 1 (1968), "that police officers may stop individuals for investigative purposes and that they may conduct limited searches for weapons when, in light of their experience, or based upon reasonable information that has been provided to them, they may reasonably believe that criminal activity may be afoot, and that the individuals involved may be armed and dangerous." *Terry*, 392 U.S. at 30. Both *Terry* and the concept of qualified immunity establish that Petitioners' actions were reasonable in light of the law and the twelve minute duration of the investigatory stop. Under similar facts, federal courts have held that police officers' conduct, in electing to stop and detain suspects for twenty minutes, because a passenger physically resembled the general description of a bank robber, was reasonable so as to not violate the detainee's Fourth Amendment rights or to defeat the officer's motion for summary judgment. *Dempsey v. Town of Brighton*, 749 F.Supp. 1215 (W.D. N.Y. 1990), *cert. denied*, ___U.S.___, 112 S.Ct. 338 (1991). Further, that the officers unholstered their weapons in effecting a *Terry* stop does not automatically elevate the stop into an arrest. *Id.* at 1223. Moreover, neither the pointing of a weapon during a *Terry* stop, *United States v. Harley*, 682 F.2d 398, 401 (2d Cir. 1982), nor the handcuffing of a suspect during a detention convert a *Terry* stop into an arrest. *Cf., United States v. Glenna*, 878 F.2d 967, 972 (7th Cir. 1989). Also, that a person is placed in a police car is not an arrest. *See, United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir. 1988). All of these cases

adjudged an officer's objective reasonableness at the time of his actions. The objective reasonableness test provides qualified immunity protection to "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, (1986).

Petitioners Vanover and Shotwell were reasonable in their belief they were justified in making the investigatory stop, regardless of whether their belief was actually mistaken. They were instructed to be on the lookout for two individual black males who would be traveling in a Chevrolet Nova, resembling the one driven by Respondents, which was heading into Nacogdoches on the day in question. The Nova was white and black with gold trim, as opposed to one the Petitioners were looking for, which was white with a blue roof. In light of the fact the suspects were considered to be armed and dangerous, based upon the information provided, Petitioners Vanover and Shotwell were perfectly reasonable to have taken safety precautions in making the felony stop and their actions were not plainly incompetent nor in knowing violation of the law.

The Fifth Circuit Court of Appeals' opinion impermissibly overlaps the circumstances upon which Petitioners effected a stop, as set forth in Respondents' search and seizure claim, with the issue of excessive force, as set forth in Respondents' remaining claims. Petitioners appealed only the issue of the district court's denial of qualified immunity on the Respondents' search and seizure claim. The Fifth Circuit had the ability to have, and should have, determined the existence of such issue instead of dismissing Petitioners' appeal. Because Petitioner Vanover's and Shotwell's actions were well within the ambit of clearly established law, they should been accorded qualified immunity.

CONCLUSION

For the reasons presented herein, Petitioners respectfully pray this Honorable Supreme Court of the United States grant the Writ Of Certiorari.

Respectfully submitted,

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February 16, 1994

APPENDIX A

LAMPKIN v. CITY OF NACOGDOCHES

Monique Lavette LAMPKIN, et al.,
Plaintiffs-Appellees,

v.

CITY OF NACOGDOCHES, et al.,
Defendants,

Jim Vanover, Police Officer, and Keith Shotwell, Police Officer,
Defendants-Appellants.

No. 91-4702

United States Court of Appeals,
Fifth Circuit.

Nov. 18, 1993.

Arrestees brought civil rights action against police officers. The United States District Court for Eastern District of Texas, Robert M. Parker, Chief Judge, denied officers' motion for summary judgment on qualified immunity issue, and officers appealed. The Court of Appeals held that court lacked jurisdiction over appeal due to disputes as to historical facts underlying qualified immunity defense.

Appeal dismissed.

Appeal from the United States District Court for the Eastern District of Texas.

Before JONES and WIENER, Circuit Judges, and LITTLE, [1] District Judge.

PER CURIAM:

[1] This is an appeal from a denial of qualified immunity to two police officers of the City of Nacogdoches, Texas.[2] The officers detained appellees Monique Lampkin and Richard Daniels for a period ranging somewhere from 12 to 30 minutes while they investigated whether Lampkin and Daniels might be connected with a threatened drive-by shooting. Lampkin contends that the officers smashed her VCR, and Daniels also contends that they hit his head on the car causing a lump and severe headaches. Questions of qualified immunity are presented at two levels; whether the officers' apprehension and detention of appellees was justified as an arrest or an investigatory stop; and whether the alleged personal and property injuries represented excessive force under the circumstances. As the officers did not clearly seek qualified immunity concerning the damage to the VCR or excessive force allegedly used on Daniels, we do not comment on those claims. We do hold that there are material fact issues in dispute concerning the basis for the officers' actions. Those issues must be resolved so that it can be determined whether the officers effected a constitutionally sound investigatory stop or arrest of appellees and, if not, whether they were shielded by qualified

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1. District Judge of the Western District of Louisiana, sitting by designation.

2. In this interlocutory appeal from the denial of qualified immunity, we are not called upon to determine appellees' state law causes of action against appellants nor to rule on their claims against the City of Nacogdoches, nor to consider the official capacity claims against appellants, which are tantamount to claims against their employer the city.

immunity. We have held that "if disputed factual issues material to summary judgment are present, the district court's denial of summary judgment on the basis of immunity is not appealable." *Feagley v. Waddill*, 868 F.2d 1437 (5th Cir. 1989); *see also*, *Johnson v. Odom*, 910 F.2d 1273, 1277 (5th Cir. 1990). We therefore have no jurisdiction over the appeal and dismiss.

I.

BACKGROUND

On the evening of July 4, 1990, Plaintiffs-Appellees Lampkin and Daniels, residents of Nacogdoches, Texas, drove a few blocks from their home to visit Lampkin's mother, who also lived in Nacogdoches.[3] When the visit ended—approximately at midnight—Lampkin and Daniels drove home in their 1978 white Chevrolet Nova, which had a black vinyl top and gold trim. The drive was short, as the home in which Lampkin and Daniels cohabited was located only a few blocks from Lampkin's mother's home. That Daniels and Lampkin had not committed any crime on or before July 5, 1990, for which they would be subject to arrest, is undisputed.

While Lampkin and Daniels were driving back to their home, two Nacogdoches police officers, Jim Vanover and Mark Lamonte, each driving alone in a separate police car, began to follow them. When Daniels and Lampkin pulled into the driveway of their home and parked, the two police officers pulled their squad cars up to the entrance of

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3. Because we are reviewing the district court's ruling on a motion for summary judgment, we have conducted a plenary review of the record. *See Sims v. Monumental General Insurance Co.*, 960 F.2d 478, 479 (5th Cir. 1992).

the driveway from opposite directions, quickly exited, shielded themselves with their respective vehicles, and pointed their service revolvers at Daniels and Lampkin. The officers ordered the two to exit their car and proceed to the back of that vehicle with their hands raised. Within a matter of moments, other Nacogdoches police officers, including Officer Keith Shotwell, arrived on the scene. What transpired next is disputed.

The affidavits and pleadings submitted by Daniels and Lampkin state that, "for no reason," they were frisked, handcuffed, and placed in the back seats of separate police cars. Meanwhile, their car was searched by Officers Vanover and Shotwell. According to Lampkin and Daniels' affidavits, "we remained handcuffed and under arrest for fifteen to thirty minutes." During the course of the encounter, Vanover and Shotwell "tore up [Ms. Lampkin's] VCR and slammed Mr. Daniel's head against the car with great force, causing Mr. Daniels significant injury, including a lump on his head, and [Daniels] has complained of bad headaches." Lampkin and Daniels also stated in their affidavits that "[i]t seemed to us like the whole police force was at our house waiving guns at us. They would not even let us check the kids." In their joint complaint, Lampkin and Daniels alleged that Daniels suffered "extreme physical pain, injuries to [his] head, temporary disability, extreme mental pain and anguish, severe emotional distress, humiliation, and embarrassment." Ultimately, the police released Lampkin and Daniels at the site of that incident.

Officers Vanover and Shotwell's story—as recounted in their pleadings, affidavits, and deposition testimony, as well as in affidavits offered by other police officers—is considerably different. According to affidavits of two

Lufkin, Texas[4] police officers, on July 1, 1990, Scott Hamilton, a black youth, was fatally shot during a gang-related fight in Lufkin. The Lufkin police there became concerned that Hamilton's relatives or fellow gang members would avenge the shooting. One Lufkin officer, Detective Rich Harrison, was informed by unnamed relatives of Scott Hamilton that "black youths" from Lufkin were planning to drive to Nacogdoches to commit a drive-by shooting of one or more black youths responsible for shooting Scott Hamilton. No information was provided about when the shooting was supposed to occur, where in Nacogdoches it would occur, or who the victims would be. Harrison also heard that the "youths" would possibly be driving a red Chevrolet Camaro, a silver Ford Ltd, or a blue and white 1978 Chevrolet Nova. Harrison passed this information on to the Nacogdoches Police Department, which in turn relayed it to all of its officers.

Scott Hamilton died during the afternoon of July 3, 1990. After Hamilton's death, his uncle informed Lufkin police that no retaliation would occur, but shortly thereafter Lufkin Police Lieutenant Alton Lenderman was informed by another Lufkin police officer[5] that the decedent's brother, Brian Hamilton, "was on his way to Nacogdoches and that he had left fifteen minutes" earlier. Lenderman's affidavit does not identify the source of Officer Parrott's information about Brian Hamilton. Hamilton was reported to be driving a blue and white 1978 Nova and carrying at least one handgun and a shotgun. Lieutenant Lenderman immediately relayed this information, including the name of the suspect, to the Nacogdoches Police Department.

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4. Lufkin is located approximately 20 miles from Nacogdoches.

5. That officer was identified only as "Officer Parrott."

The affidavits and deposition testimony of Officers Vanover and Shotwell generally comport with the affidavits of the two Lufkin police officers, although they differ in certain significant respects. Vanover and Shotwell did not claim that they were told that an individual named Brian Hamilton was coming to Nacogdoches during the afternoon of July 3, 1990; neither did they claim that they were earlier informed that black "youths" were planning to commit a drive-by shooting. Rather, they simply stated that they were informed that black "males" were planning to perpetrate the crime. Vanover and Shopwell also claimed that they were specifically informed by Lufkin police that the drive-by shooting was scheduled to occur "late" July 4, 1990, or "early" July 5, 1990. The affidavit provided by the Lufkin police officers, however, did not state that they had ever specified when the shooting was supposed to occur, other than reporting that Brian Hamilton allegedly was driving to Nacogdoches on the afternoon of July 3, 1990. Vanover also stated in his affidavit that he was informed by Lufkin police that the suspects would be carrying "several semi-automatic pistols and a semi-automatic rifle". The affidavit from Lufkin Lieutenant Lenderman stated that Brian Hamilton was armed with "at least a handgun and a shotgun."

Officer Vanover's affidavit and deposition testimony recount that he was driving in his patrol car at 11:08 p.m. on July 4, 1990, when he noticed a car that he believed was a blue and white Nova which possibly could have been a 1978 model.[6] Because the car had tinted windows, Vanover could only make out that there were two black persons of undetermined gender and age riding in the car. Although he does not state the duration of the period that he followed the car, his affidavit indicates that he did so for as much as a

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6. Vanover admitted that he could not distinguish among Novas with the model years 1973-82.

few minutes.[7] During that time, Vanover radioed a police dispatcher and requested a registration check on the Nova's license plate number. Before the check could be completed, however, the Nova pulled into the driveway of a private residence. Officers Vanover and Lamonte, in separate patrol cars, pulled up to the driveway and immediately exited their vehicles, brandished their service revolvers, and instructed Lampkin and Daniels to raise their hands and move to the back of their vehicle. The officers then frisked Lampkin and Daniels. No weapons or contraband were found during the search.

According to Officer Shotwell's affidavit and deposition testimony, he arrived at 11:04 p.m.[8] in a third patrol car after the initial stop-and-frisk was complete. According to Shotwell, while Vanover was explaining to Daniels and Lampkin why they had been stopped and frisked, he (Shotwell) glanced inside the Nova, either through an open window on the driver's side or—according to Vanover—through an open door of the car. At any rate, Shotwell states that he observed a white substance that he believed was "crack" cocaine on the passenger's seat. Before actually entering the Nova's passenger compartment to inspect further, he immediately reported to Vanover that he had discovered "crack" cocaine. Vanover proceeded to handcuff Daniels and place him in the back of his patrol car. Shotwell

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7. The affidavit claims that Vanover, and later Nacogdoches Police Officer Lamonte, tailed the car as it made turns on a number of streets. This contradicts Lampkin and Daniels' statement that they drove only one or two blocks from Lampkin's mother's residence to their own house.

8. This places Shotwell, who claims that he arrived *after* Vanover and Lamonte had completed the initial stop-and-frisk at the scene four minutes *before* the time at which Vanover claims to have spotted Lampkin and Daniels' car.

handcuffed Lampkin and placed her in his patrol car. Shotwell then searched inside the front compartment of the Nova and discovered that the "crack" was in fact a piece of mint candy. A bag of similar candies was discovered nearby. The officers immediately called off their search of the Nova and released Lampkin and Daniels. The entire episode, according to Vanover and Shotwell, took ten to twelve minutes—half of the duration according to Lampkin and Daniels' account.

Officer Vanover's deposition testimony regarding the search and seizure is significant. Vanover admitted that once Lampkin (a female) exited the Nova, he had substantial doubts about whether he and his colleague had apprehended the right persons, given the Lufkin police reports describing only male suspects. In a similar vein, Vanover admitted that as soon as he exited his patrol car at Lampkin and Daniels' driveway, he noticed that the Nova was not blue and white, but white with a black vinyl top and gold trim. Vanover also admitted that he realized that Lampkin and Daniels were adults. Finally, Vanover admitted that once he realized that the "crack" on the passenger's seat was in fact candy, he immediately ceased any further searching for weapons, even though a search for weapons had been the only purpose for detaining Lampkin and Daniels in the first place.

Nowhere in Shotwell or Vanover's deposition testimony or affidavits did they directly deny Lampkin and Daniels' allegations about the physical force used against Daniels' person and Lampkin's property. However, in his deposition testimony, Nacogdoches Police Officer Mark Lamonte claimed that he did not witness such force being applied to Daniels.

Lampkin and Daniels filed a civil rights complaint against Officers Vanover and Shotwell—in both their

individual and official capacities—and against the City of Nacogdoches. The complaint raises three main constitutional claims,[9] alleging an unconstitutional seizure of Lampkin and Daniels; an unconstitutional search of Lampkin's and Daniels' persons as well as their automobile; and the use of excessive force against Daniels' person and Lampkin's personal property.

After the above-mentioned discovery occurred, Vanover and Shotwell filed a motion for summary judgment regarding the search and seizure claims but not the excessive force claim, and raising the defense of qualified immunity; they claimed that the latter defense entitled them to immunity from suit in their individual capacities. The district court denied the motion, holding:

> The Court finds that there are genuine and material issues as to whether the investigatory stop conducted by Officers Vanover and Shotwell was reasonable under the circumstances. The Court also finds that it cannot grant summary judgment on the basis of the "qualified immunity" doctrine since the doctrine requires that the Defendants' actions not be objectively unreasonable in light of well-established law .... A determination of whether Defendants' actions were objectively reasonable necessarily involves a question of fact.

Vanover and Shotwell filed an interlocutory appeal from the district court's denial of summary judgment on the question of qualified immunity.

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9. A number of state law pendent claims were also raised.

II.

DISCUSSION

[2] Because this case is on appeal from a summary judgment motion, we review the record *de novo*, examining the evidence in the light most favorable to the non-movant. *See Pfannstiel v. City of Marian*, 918 F.2d 1178, 1183 (5th Cir. 1990). Appellants will prevail if they have demonstrated that there are no genuine issues of material fact and that they are entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Fed.R.Civ.P. 56(c). We cannot agree with their assertion that there are no disputed issues of fact material to questions of qualified immunity.

As the Supreme Court has recently instructed us, the first inquiry in the examination of a defendant's claim of qualified immunity is whether the plaintiff has "alleg[ed] the violation of a clearly established Constitutional right." *Siegert v. Gilley*, — U.S. —, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). Appellees contend that they were unlawfully stopped, detained and arrested because the officers had grossly inadequate information on which to justify their actions. They also contend that the officers' actions were objectively unreasonable and violated well-established law. More precisely, Lampkin and Daniels assert somewhat overlapping violations. They contend that the officers did not have a factual basis to detain them, that the officers arrested them without a warrant or probable cause, and that the officers had no reasonable basis to search their vehicle. The district court's ruling denying summary judgment on qualified immunity reflects these overlaps. The court found genuine and material issues of fact "as to whether the investigatory stop conducted by Officers Vanover and

Shotwell was reasonable under the circumstances." It also held that whether appellants' actions were objectively unreasonable for qualified immunity purposes necessarily "involves a question of fact."

[3] The implicit assumption of both appellees and the district court seems to be that whether the officers were wrong in deciding to make an investigatory stop or "arrest" and search of the vehicle, and whether their actions were "objectively unreasonable" under the immunity doctrine are questions that must be decided by the trier of fact. This assumption would be incorrect.

After this case was decided by the district court, the Supreme Court corrected remarkably similar errors in *Hunter v. Bryant*, — U.S. —,112 S.Ct. 534, 116 L.Ed.2d 589 (1991). The analysis of *Hunter* guides our decision. In *Hunter*, a panel of the Ninth Circuit had divided on the question whether Secret Service Agents had probable cause to arrest a man who had written a letter suggesting a possible assassination attempt on the President's life. The majority concluded that the agents had failed to sustain their burden of establishing qualified immunity because the agents misinterpreted the alleged threatening letter the defendant had written. The Supreme Court described the majority's "confusion" over the immunity defense as arising from its statement that "[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment ... based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach. 903 F.2d at 721." Commenting on this conclusion, the Supreme Court stated:

> This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury.

> Immunity ordinarily should be decided by the court long before trial. *See Mitchell [v. Forsyth]*, 472 U.S. [511], at 527-529, 105 S.Ct.[2806], at 2815-2817 [,86 L.Ed.2d 411 (1985)]. Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.

— U.S. at —, 112 S.Ct. at 536-37.

The Court emphasized that qualified immunity shields officers from a damage suit if they could have reasonably believed their actions to be lawful, "in light of clearly established law and the information the [arresting] officers possessed," *Hunter*, — U.S. at —, 112 S.Ct. at 536, quoting *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987). Even if law enforcement officials erred in concluding that probable cause existed to arrest Bryant, they would be entitled to qualified immunity if their decision was reasonable, albeit mistaken. *Id.* As the Court repeated, the qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley [v. Briggs]*, 475 U.S. [335], at 343, 341, 106 S.Ct. [1092], at 1097, 1096 [89 L.Ed.2d 271]. *Id.*

It must be recognized that even though *Bryant* diminished the jury's role in qualified immunity cases, it did not entirely abolish it. *See Bryant*, — U.S. at —, 112 S.Ct. at 537 (criticizing Ninth Circuit for "*routinely* plac[ing] the question of immunity in the hands of the jury" and noting immunity "*ordinarily* should be decided by the court") (emphasis added). Rule 56 still has vitality in qualified

immunity cases if the underlying historical facts in dispute that are material to the resolution of the questions whether the defendants acted in an objectively reasonable manner in view of the existing law and facts available to them.

Although its brief opinion is slightly ambiguous, the district court would appear to have committed post-*Bryant* error by holding that the objective reasonableness prong of the qualified immunity standard is generally a factual question for the jury. Nevertheless, we will not reverse if the district court's denial of summary judgment was correct on other grounds apparent in the record.[10] After a painstakingly detailed review of the record, we find that summary judgment indeed should have been denied because of myriad genuine issues of material historical fact. Put another way, based on the present disputed state of factual development, it is not now possible to conclude as a matter of law—considering the evidence in a light most favorable to Lampkin and Daniels—that Officers Vanover and Shotwell acted in an objectively reasonable manner, even under *Hunter v. Bryant*.

The record reflects that Lampkin and Daniels are a black man and woman, resident in Nacogdoches, who drove a black and white older model Chevy Nova into the driveway of their home from Lampkin's mother's home on the night of July 4, 1990. They were detained by a "felony stop" procedure, frisked, possibly roughed up, handcuffed and placed in separate police cars for up to thirty minutes before being released. Although no weapons were found or even

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10. *See Coral Petroleum, Inc. v. Banque Paribus-London*, 797 F.2d 1351, 1355 n. 3 (5th Cir. 1986) (*citing Davis v. Liberty Mutual Insurance Co.*, 525 F.2d 1204, 1207 (5th Cir. 1976)).

thoroughly searched for in their cars, they were accused of harboring "crack" cocaine, which turned out to be candy mints.

The appellants asserted that they were objectively reasonable in mistaking Lampkin and Daniels for two young black males from Lufkin, heavily armed, driving a blue and white 1978 Chevy Nova, who had left Nacogdoches possibly on July 3, cruising in search of revenge for a gang-related killing.

The problem this court has in evaluating the basis for the officers' actions is the same as that sensed by the district court. The facts leading up to these mistakes are not consistent among various officers' testimony and affidavits. Whether they had an objectively reasonable basis (a) to detain or (b) to arrest Lampkin and Daniels cannot be sorted out without settling on a coherent view of what happened in the first place. *See, e.g., Presley v. City of Benbrook*, 4 F.3d 405 (5th Cir. 1993). Moreover, the determination of objective reasonableness must be based on a version of the facts most favorable to the plaintiffs. As for the VCR and the force applied to Daniels, the issue of objective reasonableness must be determined in light of appellees' allegations of excessive force because appellants' evidence did not directly contradict appellees' allegations regarding those matters.

The present state of the record does not permit us confidently to state that there are no triable fact issues. Further pretrial proceedings in the district court may solve this problem, and it must be remembered that immunity should ordinarily be resolved at the earliest possible stage of litigation. *Hunter, supra*, — U.S. at —, 112 S.Ct. at 536-37. To the extent that credibility questions exist, of course, a fact-finder will be necessary.

Because the record as it presently stands appears to suggest disputed issues of material fact relevant to the officers' qualified immunity defense, the defense cannot now prevail as a matter of law, and this court is without jurisdiction to consider their interlocutory appeal. Consequently, the appeal is DISMISSED.

APPENDIX B

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JUL 17 1991
MURRAY L. HARRIS, CLERK
BY DEPUTY /s/ M. Christine Sa.

IN THE UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

MONIQUE LAVETTE LAMPKIN,	§	
and	§	
CHARLES RAYFORD DANIELS, JR.	§	
	§	
v.	§	
	§	CIVIL NO.
CITY OF NACOGDOCHES,	§	9:90-CV-173
TEXAS	§	
and	§	
JIM VANOVER, Police Officer	§	
and	§	
KEITH SHOTWELL, Police Officer	§	
	§	
Individual defendants are	§	
sued in both their individual	§	
and official capacities	§	

ORDER

Plaintiffs brought this action against the City of Nacogdoches, Texas, and Police Officers Jim Vanover and Keith Shotwell. The action was filed pursuant to 42 U.S.C. § 1983 for violations of civil rights. Specifically, Plaintiffs

complain that the alleged unlawful arrest and the accompanying unreasonable search and seizure violate rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and give rise to state law claims based on false imprisonment, intentional infliction of emotional distress, and negligent infliction of severe emotional distress. Defendants have moved for summary judgment.

After due consideration of all relevant factors, the Court finds that there are genuine and material questions of fact and that Defendants are not entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56. The Court finds that there are genuine and material issues as to whether the investigatory stop conducted by Officers Vanover and Shotwell was reasonable under the circumstances. *United States v. Gomez*, 776 F.2d 542, 546 (5th Cir. 1985).

The Court also finds that it cannot grant summary judgment on the basis of the "qualified immunity" doctrine since the doctrine requires that the Defendants' actions not be objectively unreasonable in light of well-established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A determination of whether Defendants' actions were objectively unreasonable necessarily involves a question of fact.

Finally, in regard to the arguments raised by the City of Nacogdoches, the Court finds that there is a genuine issue of fact as to what policies the City has in effect and as to what type of police training the individual Defendants received. Such issues of material fact preclude summary judgment pursuant to Fed. R. Civ. P. 56.

It is, therefore, ORDERED that Defendants' First Amended Motion For Summary Judgment is DENIED.

SIGNED this 17th day of July , 1991.

/s/ Robert M. Parker
ROBERT M. PARKER
CHIEF JUDGE

Supreme Court, U.S.
FILED
MAR - 9 1994
OFFICE OF THE CLERK

No. 93-1332

In The

Supreme Court of the United States

October Term, 1993

JIM VANOVER and KEITH SHOTWELL,

Petitioners,

v.

MONIQUE LAMPKIN and CHARLES R. DANIELS, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW:

1. Whether an interlocutory appeal from the denial of summary judgment based on qualified immunity is properly dismissed when material facts directly relevant to the qualified immunity issue are in genuine dispute.

2. Whether the dismissal of the interlocutory appeal following a plenary review of the record is in conflict with other courts of appeal given the genuine dispute with regard to material facts directly relevant to the qualified immunity issue and given that the requirements for a warrantless investigatory stop and the warrantless arrest of a citizen are well established.

3. Whether the dismissal of the interlocutory appeal is in full accord with this Court's jurisprudence given the genuine dispute with regard to material facts directly relevant to the qualified immunity issue and given that the requirements for a warrantless investigatory stop and the warrantless arrest of a citizen are well established.

4. Whether disputed facts bearing directly upon the qualified immunity determination, existed to preclude the Fifth Circuit Court of Appeals from deciding whether petitioners' conduct in stopping and detaining respondents was reasonable in light of clearly established law.

5. Whether the petitioners' conduct in stopping and searching respondents' vehicle and detaining respondents was objectively unreasonable in light of clearly established law precluding petitioners from being shielded by qualified immunity.

QUESTIONS PRESENTED FOR REVIEW: – Continued

6. Whether the Fifth Circuit Court of Appeals in deciding that a genuine dispute with regard to a material fact precluded summary judgment based on qualified immunity followed well established law.

7. Whether the dismissal of an interlocutory appeal based on qualified immunity because of genuine disputes with regard to material facts directly related to the qualified immunity entitlement violates this Court's jurisprudence given the limited scope of review of appeals based on qualified immunity.

8. Whether the dismissal of the interlocutory qualified immunity appeal following a plenary review of the record because of genuinely disputed material facts bearing directly on the qualified immunity issue places an improper burden on petitioners.

LIST OF PARTIES

PETITIONERS:

Jim Vanover
Keith Shotwell

RESPONDENTS

Monique Lampkin
Charles Rayford Daniels, Jr.

Pursuant to Rule 29.1, there are no parent companies or subsidiaries.

Party to judgment in the District Court who has no interest in the outcome of this case;

City of Nacogdoches.

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No. 93-1332

In The

Supreme Court of the United States

October Term, 1993

JIM VANOVER and KEITH SHOTWELL,

Petitioners,

v.

MONIQUE LAMPKIN and CHARLES R. DANIELS, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The unanimous opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed is *Lampkin v. City of Nacogdoches*, 7 F.3d 430 (1993), a copy of which appears in the petitioners' Appendix A. The Judgment of the United States Court of Appeals for the Fifth Circuit was entered November 18, 1993. The opinion of the United States District Court for the Eastern District of Texas was entered on July 17, 1991, a copy of which appears in the petitioners' Appendix B.

STATEMENT OF JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). This Court does not have jurisdiction to resolve genuine disputes with regard to material facts because jurisdiction over interlocutory appeals based on qualified immunity is limited to questions of law. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

STATEMENT OF THE CASE

Petitioners Jim Vanover and Keith Shotwell are City of Nacogdoches police officers and are defendants. Respondents Monique Lampkin and Charles R. Daniels, jr. are the plaintiffs.

Respondents filed their original Complaint on November 7, 1990 under 42 U.S.C. §1983 alleging in relevant part that Vanover and Shotwell had deprived them of their constitutional right to be free from unlawful arrest, unlawful investigator stop, unreasonable search and seizure, and excessive force. Respondents filed their First Amended Complaint on March 11, 1991. The United States District Court for the Eastern District of Texas had jurisdiction over plaintiffs' 42 U.S.C. §1983 claims under 28 U.S.C. §1331 and 28 U.S.C. §1343(3). Respondents' state law claims were asserted under the district court's pendent jurisdiction as expanded by 28 U.S.C. §1367.

On January 18, 1991 Vanover and Shotwell moved the Court for summary judgment based on qualified immunity. On July 17, 1991 the district court entered a Memorandum Order denying the motion for summary

judgment. Petitioners Vanover and Shotwell appealed the district court's denial of qualified immunity on the issue of respondents' search and seizure claims to the United States Court of Appeals for the Fifth Circuit. The appeal was dismissed in a decision dated November 18, 1993 because genuine material factual disputes precluded the granting of summary judgment based on qualified immunity.

The relevant facts are accurately summarized in *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 431-33 (5th Cir. 1993).

Lufkin Police Detective Harrison and Police Officer Lenderman testified by affidavit. Harrison states that a shooting occurred in Lufkin, Texas on July 1, 1990. He learned during the course of an investigation that some youths from Lufkin were planning to go to Nacogdoches to "get even". Three vehicles were mentioned, to wit a red Camaro, a silver Ford LTD and a blue and white 1978 Nova. He was also able to identify some of the youths from Lufkin that were planning to go to Nacogdoches to "get even." He passed the above information along to the Nacogdoches Police Department because of "the suggestion of the possibility of a revenge drive-by shooting in Nacogdoches by one or more of these individuals".

Officer Lenderman learned that the brother of the deceased victim of the July 1 shooting, driving a blue and white Nova, was traveling to Nacogdoches for the purpose of avenging his brother's death. On July 3, 1990 he provided information to the Nacogdoches Police Department that the suspect, Brian Hamilton, had left fifteen minutes earlier for the purpose of a drive-by shooting in

a blue and white 1978 Nova and that he was in possession of at least a handgun and shotgun.

Both Respondents Lampkin and Daniels testified by affidavit. Both testified that they were in the driveway at their home located in Nacogdoches during the early morning hours of July 5, 1990 when they were arrested at gunpoint, handcuffed, and detained by Petitioner Officers Vanover and Shotwell. The petitioners did not have an arrest warrant and respondents did absolutely nothing to give anybody any reason to stop them, detain them, or arrest them. Further, neither respondent is aware of any reason that the petitioner officers could have to believe that they had violated any law.

Both respondents were arrested and handcuffed for fifteen to thirty minutes before they were unhandcuffed and released without being charged. Neither respondent committed any criminal offense either before or after the arrests. The petitioners proceeded to search Respondent Daniels' automobile while the respondents were under arrest, although the officers did not have a warrant and, to the best of respondents' knowledge, did not have probable cause or any other good reason for searching the car.

The petitioner officers tore up Respondent Lampkin's VCR and slammed Respondent Daniels' head against the car with great force, causing him significant injury, including a lump on the head and bad headaches. It seemed to respondents like the whole police force was at the house waving guns at them and they were not even allowed to check on the kids.

Both respondents testified by affidavit that they have never owned or been a passenger in any automobile that satisfied any of the descriptions provided by the Lufkin Police Department to the Nacogdoches Police Department. To the contrary, respondents were in a white Nova with a black top and gold trim when they were stopped and arrested.

Petitioner Officer Vanover testified by affidavit and deposition and Petitioner Officer Shotwell testified by deposition. Petitioner Officer Vanover admits that the only reason he had for stopping respondents' vehicle was the description of another vehicle that he had received. According to Petitioner Officer Vanover's information, the suspect vehicle was a 1978 blue and white Nova and the suspects were black males.

Petitioner Officer Vanover claims that he learned on July 3, 1990, over twenty-four hours before the stop and detention, of the *possibility* of one or more black persons coming to Nacogdoches for the purpose of seeking revenge for a shooting that occurred in Lufkin. [emphasis added].

Petitioner Officer Vanover admitted that he did not have one whit of information that either Respondent Lampkin or Respondent Daniels had ever violated any law in their lives and that he does not have one whit of evidence that either respondent was in Lufkin at the time of the shooting. Both petitioner officers admit that neither respondent violated any law and that neither respondent engaged in any suspicious activity in their presence. This is also confirmed by Officer Lamonte who was also at the scene. Petitioner Officer Vanover admits that he is the

person who made the decision to stop the vehicle and that neither the vehicle nor its occupants were doing anything suspicious before he stopped it.

Petitioner Officer Vanover admits that after he saw the woman [Respondent Lampkin] he thought it was *probably* not the right car because his information was that the suspects in the car coming from Lufkin were supposed to be males and as soon as the car was stopped he could see that there was a woman in the car. [emphasis added]. Even after Petitioner Officer Vanover saw Respondent Lampkin in the car he still wanted to look inside the car "because I was not *absolutely positive* that was not the car that Lufkin had told us about." [emphasis added]. Petitioner Officer Vanover further admitted that he did not even look in the glove compartment to see if there was a handgun because "like I told you, once we searched the car, I had already decided that these people probably were not going to be the right ones." Petitioner Officer Vanover admits that the trunk and glove compartment were never searched because it was not necessary.

Petitioner Officer Vanover admits that he had no information whatsoever concerning where in Nacogdoches the shooting was supposed to occur, who was supposed to get shot, or when the shooting was supposed to occur. He also admits that he realized there was no blue in the vehicle that he stopped as soon as he stopped it, but he still chose to have respondents get out of the car. Petitioner Officer Vanover also admits that at the time he stopped the vehicle he knew from the report that the suspect vehicle was blue and white and that he did not have one whit of evidence that either respondent was ever down in Lufkin. He admitted that even after he

knew the car was not partially blue, as reported to him to be one of the colors, he still made the respondents get out. Further, Petitioner Officer Vanover admits that he never saw the candy in the passenger compartment that Petitioner Officer Shotwell claimed he saw. Petitioner Officer Vanover also admitted that he cannot tell the difference between a 1978 Nova and Novas manufactured as early as 1973 or as late as 1982. Finally, Petitioner Officer Vanover states that the trunk was never searched because it was not necessary to do so.

Petitioner Officer Vanover knew that the car he was looking for, unlike the car he stopped, was supposed to be licensed to somebody in Lufkin at the moment he stopped it. Finally, Petitioner Officer Vanover claimed that the only reason the vehicle was stopped was because it matched the description of another vehicle that he received, although the Lampkin/Daniels vehicle did not in fact match the description.

Petitioner Officer Shotwell agrees with Petitioner Officer Vanover that the trunk and glove compartment were not searched. Petitioner Officer Shotwell stated that he searched the car because of the "fact that there was a possible weapons [sic] and possibly narcotics in the vehicle, just for my safety and other officers' safety." Petitioner Officer Shotwell also claims that he only searched the passenger compartment and that from the very beginning he was searching for narcotics in addition to weapons. Petitioner Officer Shotwell was also aware that the suspects were black males, unlike Respondent Lampkin who is a female.

Petitioner Officer Shotwell is not able to describe the vehicle. However, he claims to recall Petitioner Officer Vanover stating that there was a *possibility* that the vehicle was the vehicle that they were looking for as the suspect in a drive-by shooting. He also recalled hearing about the possibility of a drive-by shooting a day or days before the incident.

Petitioner Officer Shotwell claims that he saw a candy mint in the car that he thought was "possibly crack cocaine." Upon visual inspection Petitioner Officer Shotwell admits that he determined that the candy was in fact candy without ever testing same or submitting same for chemical analysis.

Petitioner Officer Shotwell admits that he is the person responsible for handcuffing Respondent Lampkin and detaining her. However, Petitioner Officer Shotwell states that at no time did he decide that Respondent Lampkin was not free to go, he never told her she was not free to go, and he never made any conclusion as to whether she was free to go.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THIS COURT HAS ALREADY DECIDED THE SCOPE OF REVIEW OF INTERLOCUTORY APPEALS BASED ON QUALIFIED IMMUNITY.

This Court carved out an exception in qualified immunity cases to the general rule that interlocutory orders are not appealable in *Mitchell v. Forsyth*, 472 U.S. 511, 106 S.Ct. 2806, 86 L.Ed. 2d 411 (1985). Specifically, the

Court held that a district court's denial of a claim of qualified immunity is appealable to the extent that it turns on an issue of law. *Id.* U.S. 530, S.Ct. 2817.

This Court in *Siegert v. Gilley*, ___ U.S. ___, 111 S.Ct. 2920 (1991) succinctly set out the method for reviewing interlocutory appeals based on qualified immunity. First, the reviewing court must determine whether the complaint states a cause of action. *Id.* 1793. Second, the reviewing court must determine whether the right was clearly established at the time of the claimed constitutional violation. *Id.* 1793. The review is limited to these purely legal questions. *Id.* 1793.

Factual allegations are examined only to determine whether they would be sufficient, if proven, to make out a violation of clearly established law. *Johnson v. Odom*, 910 F.2d 1273, 1277 (5th Cir. 1990). The denial of summary judgment sought on the basis of immunity is not appealable where disputed factual issues material to immunity are present. *Feagley v. Waddill*, 868 F.2d 1437, 1439 (5th Cir. 1989). Of course, it is conceded in the case at bar that the warrantless arrest of a citizen absent probable cause, the warrantless investigatory stop in the absence of a reasonable suspicion, and the warrantless search and seizure of a citizen's vehicle absent reasonable suspicion all violate well-settled law.

In determining the entitlement to qualified immunity, the reviewing court must ask whether the officers acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, action was possible. *Hunter v. Bryant*, 502 U.S. ___, 112 S.Ct. 534, 536-37, 116 L.Ed.2d 589 (1991). Simply put, qualified

immunity shields officers from a damage suit only if they could have reasonably believed their actions to be lawful in light of clearly established law and the information they possessed. *Hunter, supra,* at 112 S.Ct. 536; *Anderson v. Creighton,* 438 U.S. 635, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987).

Of course, it is an elementary principle of black letter law that summary judgment is not available under Rule 56 of the Federal Rules of Civil Procedure when, as in the case at bar, there is a genuine dispute with regard to material facts. As pointed out by the court below, the material facts presented by the victims stand in stark contrast to the material facts alleged by the petitioners and there is even a serious factual dispute among petitioners and their witnesses concerning what information petitioners possessed at the time of the incident. Stated differently, whether petitioners are entitled to qualified immunity turns on what happened. What happened depends on who you believe.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FAITHFULLY FOLLOWED THIS COURT'S TEACHINGS IN DISMISSING THE QUALIFIED IMMUNITY APPEAL.

Even a cursory review of the opinion below reveals that the Fifth Circuit faithfully followed applicable law as enunciated by this Court in reviewing the interlocutory qualified immunity appeal. *Lampkin v. City of Nacogdoches,* 7 F.3d 430, 434-36 (5th Cir. 1993).

III. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS ARE SIMPLY WRONG WHEN THEY CLAIM THAT THE FIFTH CIRCUIT'S OPINION IS IN CONFLICT WITH OTHER CIRCUITS.

Rule 56 provides in relevant part that summary judgment is inappropriate where there is a genuine dispute with regard to material facts. Not a single circuit court, petitioners' protestations notwithstanding, has ever held that a reviewing court is entitled to resolve core factual disputes where the different versions are supported by substantial evidence. The law regarding warrantless search and seizures of citizens, warrantless investigatory stops, warrantless arrests, and warrantless search and seizures of vehicles was well established at the time of the incident. Stated differently, whether petitioners are entitled to summary judgment based on qualified immunity depends on whether their conduct was objectively reasonable. Whether their conduct was objectively reasonable turns on the information the petitioners possessed at the time of the incident and the petitioners' conduct at the time of the incident. As pointed out by the court below, petitioners' testimony with regard to their conduct stands in stark contrast to the victims' testimony regarding what the petitioners did. *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 431-33 (5th Cir. 1993).

Of course, no reviewing court can resolve this credibility dispute. Further, the knowledge that petitioners had in their possession at the time of the incident is also in serious dispute, even between petitioners.

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY IDENTIFIED THE FACTUAL DISPUTES WHICH PRECLUDED SUMMARY JUDGMENT.

Petitioners baldly assert that the court below erroneously dismissed the interlocutory appeal due to a perceived but unidentified factual dispute. In fact, the court below set out in detail the genuinely disputed material facts that are directly related to the qualified immunity issue. *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 431-33 (5th Cir. 1993)

V. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS DISTORT THE BASIS OF THE LOWER COURT'S OPINION.

Petitioners baldly state that the court of appeals dismissed the interlocutory appeal "due to a perceived but unidentified factual dispute". Reasons for granting the writ, I. The truth is that the court below conducted a plenary review of the record, *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 431 n. 3 (5th Cir. 1993), and discussed in detail the facts directly related to the qualified immunity issue that precluded summary judgment at 431-33.

VI. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS DISTORT THE FACTS.

The facts set out in the Petition for Writ of Certiorari, Statement of the Case, p. 2-6 resolve all genuine disputes concerning material facts favorable to petitioners and ignore significant facts favorable to the victims, contrary

to basic summary judgment law. Compare petitioners' Statement of the Case with respondents' Statement of the Case. Also compare petitioners' Statement of the Case with the disputed material facts recognized by the court below in *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 431-33 (5th Cir. 1993).

VII. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS ARE NOT SHIELDED BY QUALIFIED IMMUNITY GIVEN THAT THEIR CONDUCT VIOLATED WELL-SETTLED LAW.

A. Law

As our Supreme Court has succinctly stated:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, ___, 20 L.Ed.2d 889, 898 (1968) quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251, 35 L.Ed. 734, 737, 11 S.Ct. 1000 (1891).

It is crystal clear that the unlawful arrest of a citizen by law enforcement officials amounts to a deprivation of liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution. *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54, (1975); *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, ___, 20 L.Ed.2d 889, 898 (1968); *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); *Kersh v. Derozier*, 851 F.2d 1509 (5th Cir. 1988).

On July 5, 1990 at the time petitioners arrested the victims it was well settled law that policemen, absent an arrest warrant, could not arrest citizens unless the citizens had committed an offense or were committing an offense in petitioners' presence. The arrest must be supported by probable cause even if exigent circumstances preclude the obtaining of an arrest warrant.

Probable cause depends "upon whether, at the moment the arrest was made, . . . the facts and circumstances within [petitioners] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [citizen] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964)

It is also clear that an investigatory stop in the absence of a reasonable suspicion of criminal activity violates well-settled law. A law enforcement officer is required to have a "reasonable suspicion of criminal activity" before he is permitted to make a "Terry stop". *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660, ___ (1979); *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). In order to warrant an investigative stop, the "reasonable suspicion" must be based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion and the facts must be judged against an objective standard. In *United States v. Gomez*, 776 F.2d 542 (5th Cir. 1985) the standard was articulated as follows:

> A valid investigatory stop under *Terry* and its progeny, in simplest terms, requires a reasonable conclusion by the police officer, in light of

> his experience, that some kind of criminal activity is taking place. Reasonable suspicion must be based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' Finally, these facts must 'be judged against an objective standard: would the facts available to the officer at the moment of [the] seizure . . . warrant a man of reasonable caution in the belief' that the action taken was appropriate?

Gomez, 776 F.2d at 546 quoting, *Terry v. Ohio*, 392 U.S. at 21, 88 S.Ct. at 1880, 20 L.Ed.2d at 906 (citations and footnotes omitted). See also, *United States v. Lopez-Gonzalez*, 916 F.2d 1011, 1013 (5th Cir. 1990).

The Court in *Terry* made several observations concerning investigative stops that are of importance in the case at bar in the event this Court is inclined to treat the victims' arrest as an investigative stop. First, the Court made it clear that it was not indicating approval of police misconduct outside the legitimate investigative sphere. *Terry v. Ohio*, 392 U.S. 1, 15, 20 L.Ed.2d 809, 902, 88 S.Ct. 1868, ___ (1968). Second, the focus is a dual one – whether the officer's action is justified at the inception and whether it is related in scope to circumstances which justify it in the first place. *Id.*, 392 U.S. at 20, 20 L.Ed.2d at 905, 88 S.Ct. at ___. Third, subjective good faith alone is not sufficient to support a *Terry* stop and a *Terry* stop must be based on something more substantial than hunches. *Id.*, 392 U.S. at 22, 20 L.Ed.2d at 906, 88 S.Ct. at ___. Finally, a search for weapons in the absence of probable cause to arrest must be strictly circumscribed by the exigencies which justify the initiation. *Id.*, 392 U.S. at 25-26, 20 L.Ed.2d at 908, 88 S.Ct. at ___.

B. Law Applied to Facts

It is conceded that there is no bright line test for determining precisely the difference between an arrest and an investigatory stop. It is uncontroverted that the victims were handcuffed at gunpoint and detained for several minutes by petitioners. These facts certainly support the victims' claim that they were arrested. To deprive a person of his liberty by legal authority is a not wholly satisfactory definition of an arrest provided by Black's Law Dictionary, Rev. 4th Ed. (1968). This Court recently stated:

> [a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.

Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317, ___ (1984). See also *United States v. Bengivenga*, 488 F.2d 593, 596-97 (5th Cir. 1988) (en banc). Stated differently, a person is arrested when a reasonable man in the same position would determine that he is no longer free to move without the consent of the officers. *United States v. Johnson*, 846 F.2d 279, 283 (5th Cir. 1988).

It cannot be seriously contended that any reasonable person in the victims' position would feel free to leave without the consent of the officers in the case at bar given that the victims were handcuffed at gunpoint. In any event, the court below did not need to reach the issue of whether the detention amounted to an arrest because genuine and material disputed issues of fact exist with regard to whether Petitioner Vanover even had sufficient

information to justify an investigatory stop. Therefore, the court below quite properly treated the respondents' detention by petitioners as an investigatory stop in dismissing the appeal without reaching the arrest issue.

It is clear that petitioners lacked a reasonable suspicion of criminal activity that was based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion given that the facts must be judged against an objective standard. *Terry v. Ohio, supra,* 392 U.S. at 21, 88 S. Ct. at 1880, 20 L.Ed.2d at 906; *United States v. Lopez-Gonzalez, supra,* 916 F.2d at 1013; *United States v. Gomez, supra,* 776 F.2d at 546. Specifically, petitioners' sole justification for the initial stop is that the victims' vehicle matched a description provided to them by the Lufkin Police Department over twenty-four hours earlier that a shooting could occur at some unknown time in some unknown place in Nacogdoches. Of course, even this sole justification turned out to be untrue in light of the facts that the victims' car was not even the same color as the color of the suspect vehicle and the "suspect vehicle" had already left Lufkin, less than 25 miles from Nacogdoches, at the time the "suspect vehicle" description was received over 24 hours before the respondents' vehicle was stopped.

Even if the initial stop at gunpoint could be considered a justifiable investigatory stop, it is clear that the petitioners should have immediately released the victims after they realized that the car was the wrong color and Lampkin was the wrong sex. It is undisputed that Petitioner Vanover had the wrong color/wrong sex information before the victims were handcuffed and detained.

In summary, the initial stop was based on nothing more substantial than the hunches condemned in *Terry, supra,* and the victims' subsequent detention was certainly not supported by probable cause as that term is defined in *Beck, supra.*

Petitioner Shotwell's claim that he thought the candy mint inside the Lampkin/Daniels vehicle was crack cocaine strains credulity and, in any event, is largely irrelevant because Petitioner Shotwell admits he was able to determine by visual inspection at the scene that the candy was in fact candy and that the mint was not even submitted for analysis.

A primary reason for the reduced amount of information required for an investigatory stop as opposed to a warrantless arrest is because investigatory stops are generally less intrusive than arrests. Of course, the intrusiveness of the investigatory stop in the case at bar, assuming that it was an investigatory stop and not an arrest, was much greater than the intrusiveness of a typical arrest given that the victims were detained at gunpoint for many minutes and one of the victims had his head slammed against the car.

C. Petitioners are Not Entitled to Qualified Immunity In Their Individual Capacities Because They Violated Well-Established Law

Petitioners are not shielded by qualified immunity in their individual capacities because their unconstitutional acts violated well-established law. In *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) our

Supreme Court eliminated the subjective element previously incorporated into the qualified immunity/good faith defense. Specifically, the Court held that governmental officials are not able to hide behind the qualified immunity defense when their conduct violates clearly established constitutional rights. *Id.* 457 U.S. at 818, 102 S.Ct. at 2738, 723 L.Ed.2d at ___. Simply put, the subjective state-of-mind component of good faith immunity no longer exists and qualified immunity is defined in terms of objective *conduct*, not subjective state of mind. *Harlow, Id.; Mitchell v. Forsyth*, 472 U.S. 511, 517, 105 S.Ct. 2806, 2810-2811, 86 L.Ed.2d 411, ___ (1985).

In *Davis v. Scherer*, 486 U.S. 183, 191, 104 S.Ct. 3012, 3017, 82 L.Ed.2d 139, ___ (1984) the Supreme Court reiterated the simple test for qualified immunity:

> Whether an official may prevail in his qualified immunity defense depends upon the objective reasonableness of [his] conduct as measured by reference to clearly established law. No other circumstances are relevant to the issue of qualified immunity.

Id. (Parenthetical language and citations omitted.)

In *Malley v. Briggs*, 475 U.S. 335, 345, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271, ___ (1986) the Court once again rejected the attempt of a police officer to reverse the "objective good faith" concept developed in *Harlow*.

In summary, it is and was well established at all times relevant hereto that an investigatory stop is unlawful unless it is supported by sufficient facts to give rise to a reasonable suspicion and unless it is limited in scope. It is and was equally well established law that a warrantless

arrest in the absence of probable cause is unlawful. Therefore, if petitioners did what the victims have properly pled, introduced evidence of, and are prepared to prove that they did, they are not protected by qualified immunity because they violated well settled law.

CONCLUSION

Respondents respectfully pray that the petition for writ of *certiorari* be in all things denied for the reasons set out above.

Respectfully submitted,

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